

In the United States Bankruptcy Court

for the

Southern District of Georgia

Brunswick Division

FILED

at 1 O'clock & 30 min P M

Date 12/20/00

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia pB

In the matter of:

BARRY DEAN MICHAEL

FCI Jesup

2680 Highway 301 South

Jesup, Georgia 31599

Debtor

Chapter 7 Case

Number 00-21252

ORDER ON DEBTOR'S REQUEST FOR RECONSIDERATION

On December 12, 2000, Debtor Barry Dean Michael filed an "Incarcerated Pro Se Debtor's Request for Reconsideration or Relief Under Fed. R. Civ. P. 60(b) from this Court's November 30, 2000, Order Denying Debtor's Request for Leave of Court to Participate in 'Meeting of Creditors' Telephonically." In the alternative, Debtor requests that this Court order the United States Marshal's Service to escort and deliver Debtor to the meeting of creditors. After careful consideration of the motion and applicable law, the Court finds that Debtor's motion should be denied.

The facts of this case are as follows. Pro se Debtor Barry Dean Michael filed for protection under chapter 7 of the Bankruptcy Code on September 5, 2000. At the time of filing, Debtor was, and remains, incarcerated at the Federal Correctional Institute located

in Jesup, Georgia.¹ On October 13, 2000, Debtor filed a "Request for Leave of Court to Participate in the Meeting of Creditors Telephonically Due to his Incarceration." In view of the pending motion, the Trustee continued the meeting of creditors from October 23, 2000, to December 4, 2000. On November 30, 2000, I entered an Order denying Debtor's motion to appear at the meeting of creditors telephonically on the ground that there was no authority for Debtor's request. Subsequently, on December 12, 2000, Debtor filed the instant motion seeking relief from the November 30, 2000, Order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Debtor requests that this Court reconsider the November 30, 2000, Order denying his request to participate in the meeting of creditors telephonically due to his incarceration. Debtor filed his motion for reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure which is made applicable to bankruptcy cases by Bankruptcy Rule 9024. Rule 60(b) provides in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or

¹According to Debtor's "Request for Leave of Court to Participate in the Meeting of Creditors Telephonically Due to his Incarceration" filed on October 13, 2000, Debtor has been incarcerated in the federal prison system for the past eleven (11) years and will not be released until August 2007.

excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment.

Fed. R. Civ. P. 60(b). Relief under Rule 60(b) may be granted “only upon an adequate showing of exceptional circumstances.” Richards v. Aramark Services, Inc., 108 F.3d 925, 927 (8th Cir. 1997)(other citations omitted). “The movant bears the burden of proving one of the six exceptions.” Drake v. Dennis (In re Dennis), 209 B.R. 20 , 25 (Bankr. S.D.Ga. 1996)(citation omitted). “Permitting the application of any of the enumerated subclauses is within the sound discretion of the trial court presiding over the case.” Id.

Debtor’s motion asserts that relief should be afforded under Rule 60(b)(1) on the grounds of mistake or fundamental fairness. Debtor essentially requests that the Court waive his personal appearance at the meeting of creditors and appear by telephone. Debtor contends that there is authority for the Court to permit Debtor to participate in the meeting of creditors and other bankruptcy hearings telephonically and cites two non-bankruptcy cases wherein witness testimony was permitted by telephonic transmission in support of this

contention. In the first case cited by Debtor, Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000), the Ninth Circuit Court of Appeals upheld the admission of testimony made by a witness telephonically at a deportation hearing on the grounds that the testimony was fair and did not violate due process. Id. at 1185-86. In the second case cited by Debtor, U.S. v. Sunrhodes, 831 F.2d 1537 (10th Cir. 1987), the Tenth Circuit Court of Appeals found that the admission of testimony taken during a telephone interrogation during a restitution hearing was not a violation of the defendant's rights under the Confrontation Clause, nor a violation of the hearsay rule. Id. at 1544. While the cases cited by Debtor provide authority for the use of witness testimony by telephonic transmission in certain civil proceedings, they are not binding on this court and do not persuade this Court to permit Debtor to appear at the bankruptcy meeting of creditors or other bankruptcy hearings telephonically. As the Court will discuss infra, Debtor's personal appearance at the meeting of creditors is mandated by the Bankruptcy Code.

Bankruptcy is a privilege, not a right. In re Sochia, 231 B.R. 158, 160 (Bankr. W.D.N.Y. 1999); In re Khan, 35 B.R. 718, 719 (Bankr. W.D.Ky. 1984). "There is no constitutional right to obtain a discharge of one's debts in bankruptcy." United States v. Kras, 409 U.S. 434, 446, 93 S.Ct. 631, 638, 34 L.Ed.2d 626 (1973). One who petitions for relief under the Bankruptcy Code is responsible for complying with the certain duties outlined in the Bankruptcy Code. These duties include filing appropriate statements and

schedules, appearing at the meeting of creditors, and cooperating with the case trustee and the United States Trustee regarding the administration of the bankruptcy estate. In re Sochia, 231 B.R. at 160. Section 341(a) of the Bankruptcy Code provides: “[w]ithin a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.” 11 U.S.C. Section 341(a). Debtor’s presence is required at the meeting of creditors pursuant to Section 343 of the Bankruptcy Code, which states:

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

11 U.S.C. Section 343 (emphasis added). Bankruptcy Rule 2003(a) provides, in relevant part, that “[t]he meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest.” Fed.R.Bankr.P. 2003(a). “There is nothing in the plain language of either Section 343 or Rule 2003 which permits the U.S. Trustee or the Bankruptcy Court to waive the requirement that the debtor ‘shall’ appear and submit to an examination under oath at the meeting of creditors.’ In re Sochia, 231 B.R. at 161. There are no exceptions outlined in the

statute for appearance at the meeting of creditors by telephone. "The statute is clear, positive and unambiguous. The mandatory direction is: 'The debtor shall appear and submit to examination.'" In re Martin, 12 B.R. 319, 320 (Bankr. S.D.Ala. 1981).

A review of case law involving requests by debtors to be excused from the meeting of creditors reflects that a number of bankruptcy courts have held that the debtor's personal appearance at the meeting of creditors is mandatory with no exceptions. See In re Import Toy Sales, Inc., 41 B.R. 784 (Bankr. S.D.Fla. 1984); In re Martin, 12 B.R. 319 (Bankr. S.D.Ala. 1981). Despite the mandatory language of the Code, some bankruptcy courts have found discretion in waiving the mandatory language to excuse a debtor from the meeting of creditors where a good and sufficient reason exists. See In re Vilt, 56 B.R. 723 (Bankr. N.D.Ill 1986); In re O'Donnell, 43 B.R. 679 (Bankr. E.D. Pa 1984). I reject the portion of the Vilt opinion which allows an incarcerated person the same latitude as a gravely ill co-debtor under an "honest but unfortunate debtor" rubric. In addition, "[n]one of the cases require a bankruptcy court to waive the debtor's appearance at a section 341(a) meeting." In re Chandler, 66 B.R. 334, 336 (N.D.Ga. 1986). In the case at bar, Debtor requested to appear at the meeting of creditors telephonically due to his incarceration. This Court declines to follow the rationale of the courts who have waived the mandatory language of the Code and concludes that Debtor's incarceration does not constitute a good and sufficient reason to waive Debtor's personal appearance at the meeting of creditors or to

permit telephonic examination of the Debtor. I hold that Debtor has not satisfied the Rule 60(b) requirements of proving mistake and that Debtor has failed to carry his burden of proof to show exceptional circumstances exist for the Court to grant relief from the November 30, 2000, Order. Accordingly, Debtor's Motion for Reconsideration pursuant to Rule 60(b) will be denied.

Debtor also argues that "fundamental fairness demands that provisions be made to permit the incarcerated debtor the use and protection of the United States Bankruptcy Court, whether or not any authority exists at the present time." Debtor's Motion to Reconsider at 4. The Court believes that the drafters of the Bankruptcy Code addressed Debtor's fairness concerns by weighing the benefits and burdens of bankruptcy protection. The provisions of the Bankruptcy Code strike a balance among debtors, creditors, and trustees. By seeking the protections afforded under chapter 7 from his creditors, the Bankruptcy Code requires Debtor to fulfill certain duties. One of these duties is to personally appear at the meeting of creditors for examination by the trustee and creditors. As previously discussed, the Bankruptcy Code makes this appearance mandatory and does not provide an exception for telephonic appearance.

Finally, the Court will address Debtor's alternative request to order the United States Marshal's Service to escort and deliver Debtor from the correctional institute to the

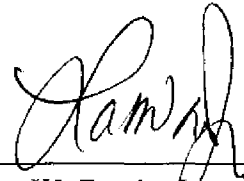
meeting of creditors or other bankruptcy hearings. Several courts have recognized the limitations placed upon inmates in pursuing their own civil actions. Specifically, the United States Supreme Court has stated:

[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right . . . to parties in all the courts of the United States to 'plead and manage their own causes personally'.

Price v. Johnston, 334 U.S. 266, 285-86, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948), rev'd on other grounds by McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed. 2d 517 (1991)(internal citation omitted); Poole v. Lambert, 819 F.2d 1025 (11th Cir. 1987). In view of the prevailing case law and the fact that bankruptcy protection is a privilege, not a right, as well as taking into consideration the administrative and monetary burdens that would be placed on the Court, Trustee, creditors, and the Marshal's service by Debtor's request, the Court concludes that Debtor's request for an order requiring the United States Marshal Service to transport Debtor to and from his bankruptcy hearings should be denied.

IT IS HEREBY ORDERED that Debtor's request for reconsideration of or relief under Fed. R. Civ. P. 60(b) from this Court's November 30, 2000, Order denying

Debtor's request for leave of court to participate in 'meeting of creditors' telephonically on the grounds of mistake or fundamental fairness; or alternatively, Debtor's request that this Court order that the U.S. Marshal's Service escort and deliver Debtor from the Federal Correctional Institute in Jesup to the U.S. Courthouse in Brunswick, Georgia for a newly scheduled meeting is hereby DENIED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 19th day of December, 2000